



Department of Law Monthly Report

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Collections & Support

COLLECTION ACTIVITIES

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In April, the collections unit opened 147 criminal and 35 juvenile restitution cases for collection. Initial notices were sent to 252 restitution recipients. Thirty-one judgments were paid in full, and satisfactions of judgment were filed in these cases. The unit received payments totaling \$36,388.62 toward criminal restitution judgments and payments totaling \$11,217.69 toward juvenile restitution judgments this month. We requested 225 disbursement checks and issued 174 checks to recipients.

In addition, the unit opened three OSHA and two civil collection files and closed four APOC and two civil collection files as paid in full. On the criminal side, the unit sent 53 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues. Quarterly reports were prepared for the Department of Corrections and the court system.

PERSONNEL CHANGES

Cindy Shelton joined the Collections unit as an Administrative Clerk II and has been working to clear the backlog of judgments to be entered. We are thrilled to have her.

Fair Business Practices

ENSTAR RATE CASE SETTLES

In April, the final phase of the Enstar rate case settled. This final phase of Enstar's first rate case in over 15 years involved Enstar's Cost of Service Study and Rate Design. The Public Advocacy section (PAS) had opposed two parts of Enstar's rate design, as well as an attempt by the Municipality of Anchorage's Municipal Light & Power (ML&P) to shift approximately \$900,000 in costs from power plant customers (ML&P, Military, Chugach) to Enstar's residential and small commercial customers.

The settlement agreement adopted virtually all of the positions argued by the PAS, with the exception of a customer charge to residential customers to be phased in over two years, with no net increase in expense to residential customers associated with the PAS concession. Under the settlement agreement, residential rate payers will see a reduction in base rates (excluding gas costs) of approximately 11 percent. Small and large commercial customers will receive rate increases in base rates, and power plant customers will receive a base rate decrease, all of which was justified given the 15 year passage of time and changes in Enstar's cost of serving each customer class.

The stipulation has been presented to the RCA for its approval. AAG Steve DeVries represented the Public Advocacy section.

Governmental Affairs

RETALIATION CASE GOES TO TRIAL

Trial began in United States District Court on April 28 in a case involving an employee's claims that she suffered retaliation for filing discrimination complaints. Although the employee continues to work for the Department of Natural Resources, she claims that the department retaliated against her by failing to appeal the reclassification of her position in 1996 and by placing her on probation when the reclassification took effect. The department explained to the employee and the jury that it did not appeal the reclassification because the reclassification increased the assigned salary range for the employee's position and seemed appropriate. The department also explained that it had placed on probation all employees whose positions were reclassified to job classes at higher salary ranges. Next month . . . the verdict. AAG Dave Jones represented the department.

STATE MOVES TO DISMISS LEGISLATIVE EMPLOYEE'S SUIT FOR PER DIEM PAYMENTS

The state moved to dismiss a legislative employee's suit alleging that he and other legislative employees are entitled to the same per diem payments that legislators receive during legislative sessions. The legislative employee asserts that he and other similarly situated legislative employees are entitled to per diem payments for each day of legislative sessions the employees relocated to Juneau to attend. The state moved to dismiss the suit primarily on the ground that the employee has not exhausted statutory procedures for presenting claims such as these. Deputy AG Scott Nordstrand and AAG Dave Jones handled this case.

VETERAN AAG JOHN GAGUINE RETIRES

Assistant Attorney General John Gaguine retired from the department as of March 31, 2003. His expertise in retirement and benefits work, as well as constitutional law issues, will be missed. The Governmental Affairs section extends best wishes to him.

Legislation/Regulations

LEGISLATIVE PACE INCREASES REQUESTS FOR LEGAL SERVICES

During April 2003, the Legislation and Regulations section spent a busy month editing draft legislation, amendments to introduce legislation, and bill reviews.

The section also conducted revisions of regulations projects for several occupational licensing boards, the Board of Fisheries, the Board of Game, the Department of Labor and Workforce Development, the Regulatory Commission of Alaska, and the Department of Revenue. The section also is beginning revising regulations within the statutory scope of the revisor's power to reflect the Executive Orders not disapproved by the legislature this session.

Natural Resources

STELLER SEA LION CASE DISMISSED

The United States District Court for the Western District of Washington has dismissed the case *Greenpeace v. National Marine Fisheries Service*. In February, the State of Alaska filed a motion to intervene in the case as a defendant in order to protect state's interests in the affected fisheries. The court

did not rule on the state's motion before dismissing the case on the parties' stipulation. The dismissal ends nearly five years of litigation relating to steller sea lions that had at one point resulted in an injunction against trawling in federal fisheries along much of the coast of Alaska.

Special Litigation

LEGISLATION PASSES TO PROVIDE WORKERS' COMPENSATION REMEDIES TO STATE-EMPLOYED SEAMEN

The Juneau Special Litigation section spent much of April working on legislative activities regarding the governor's bill to provide workers' compensation benefits for state-employed seamen in lieu of traditional maritime remedies. Senate Bill 120 amends AS 09.50.250 to assert the state's sovereign immunity with respect to claims for injury, illness, or death by or on behalf of seamen employed by the state, and provides for workers' compensation benefits as the exclusive remedy. The bill will apply to injuries or illnesses occurring after July 1, 2003. It passed both houses without amendment.

SUMMARY JUDGMENT GRANTED FOR SEARCH BASED UPON OFFICER SAFETY

In Fairbanks, Judge Hopwood granted summary judgment to the state and two state troopers who were sued for searching the plaintiff and his vehicle for weapons during a traffic stop. In his civil lawsuit for damages, the plaintiff alleged trespass and civil rights violations under the U.S. and Alaska constitutions. The officers moved for summary disposition, noting that the state's computerized information system, APSIN, contained officer safety alerts that the plaintiff was hostile to law enforcement and carried firearms. Judge Hopwood held that these warnings, coupled with plaintiff's behavior during the stop - he called 911 to request backup officers and to

report a "crime in progress" - provided reasonable grounds for the officers to conduct a limited weapons search for their own safety. Plaintiff is expected to appeal. AAG Richard Keck is handling this case.

Transportation

OPINION ON TRIBAL EMPLOYMENT RIGHTS ORDINANCE ISSUES

A tribal rights employment ordinance (TERO) requires contractors operating within an Indian reservation to grant hiring preferences to Indians and Alaska Natives on all projects constructed within the reservation. TEROs also usually impose on contractors operating within reservations a percentage tax based on the contract price.

We issued an opinion to DOT/PF concluding that, although the Metlakatla Indian community had jurisdiction to promulgate and enforce its TERO against a state contractor constructing a project within a state ferry terminal right-of-way located on the Annette Island Reserve, the state could not require its contractor to grant Native hiring preferences.

We concluded that the tribe retained sufficient dominion and control over the right-of-way at the time it was issued to support the exercise of tribal jurisdiction. However, in the absence of a congressional delegation to the state of the federal trust responsibility toward Indians, requiring a state contractor to comply with TERO Native hiring preferences would violate the Equal Protection Clause of the Alaska Constitution.

Our opinion is limited to the application of Metlakatla's TERO within the ferry terminal easement. The tribe might not have jurisdiction within other rights-of-way located within the reservation. In addition, we concluded that other Alaska tribes probably

would not have legal authority to enforce any aspect of a TERO because those tribes generally do not inhabit Indian country, although each TERO will have to be analyzed on a case-by-case basis.

STATE WINS AGUILAR HEARING IN NATIVE ALLOTMENT DISPUTE

Mr. Stan Paukan has made a Native allotment claim that conflicts with the St. Mary's airport. The state refused to voluntarily reconvey the disputed land to the BLM so that Mr. Paukan could receive clear title to his allotment. In 1999, the Bureau of Land Management gave the state 90 days to submit additional evidence disputing the allotment claim. If the evidence raised a sufficient fact issue, an *Aguilar* hearing for title recovery would be initiated by the BLM. If the additional evidence was insufficient, then the allotment would simply be re-approved, and the matter would be referred to the Justice Department for title recovery from the state.

In its decision of June 6, 2003, the BLM determined that the state had submitted sufficient evidence to require an *Aguilar* hearing, and to cancel the earlier validity determination of Mr. Paukan's claim. At the *Aguilar* hearing Mr. Paukan's heirs will be required to prove that Mr. Paukan had substantial actual possession and use of the land, and that his use was sufficiently open and notorious to provide third parties with notice that the lands were subject to his claim. The state is now in a good position to preserve the integrity of the St. Mary's airport. AAG John Athens represented the state in this case.

Criminal Division

BARROW

Frank Mueller was arrested under the name of "Richard" Mueller for a DV assault. He pled out at arraignment and received six months to

serve. Before he was transported to the jail, one of his old high school classmates recognized him and said, "Hi Frank." Police then learned that "Richard" was actually Frank Mueller, twin brother of the real Richard, who was with his own probation officer in Fairbanks during the DV assault. The next day Frank Mueller pled out at arraignment for False Report, and received another six months to serve in jail.

A man received two consecutive one-year sentences for drunk driving and weapons offenses for having two pistols in his possession while intoxicated, and was also fined \$9,000. Another man was sentenced to two years in a felony drug case.

BETHEL

A man was convicted of DUI and driving s/o an operators license after a jury trial.

The grand jury in April indicted 11 people. There were three second-degree sexual assault indictments, two second-degree sexual abuse of a minor indictments, and one attempted second-degree sexual abuse of a minor indictment. There was also one indictment on misconduct involving a controlled substance in the third degree, one felony DUI indictment, and three indictments for criminal mischief in the second degree.

DILLINGHAM

A Naknek jury trial failed to reach a verdict on a charge of sexual assault in the first degree. The defendant later pled to lesser charges.

A Dillingham jury acquitted a man of DUI. The officer testified that he observed the defendant change places with his passenger after being stopped, a claim which the defendant and passenger disputed at trial.

The grand jury indicted six people. Two were indicted for sexual assault in the first degree, one for arson in the first degree, two for assault

in the second degree, and one for charges of Incest and sexual assault in the second degree.

FAIRBANKS

The Fairbanks office welcomed new attorney Danielle Simmons, a graduate of the University of Vermont.

Jay Hodges secured a conviction in a meth lab case against John Moore after he turned down opportunities to plead to lesser and consolidated charges in this, and another pending case. Although the jury was not advised of the presence of a child living in the home while the lab was in operation, it is expected that this factor will significantly impact sentencing.

A man was indicted on felony assault and coercion for forcing his former roommate at knifepoint to drink large quantities of Listerine. The defendant then cut himself with the knife and forced the victim to drink some of his blood, claiming that he was infected with the AIDS virus. The victim eventually escaped by running and hiding in a local Safeway store, where employees notified the police.

A 17-year-old employee of one of the local Subway restaurants has been charged as an adult with kidnapping and sexual assault in the first degree, for locking a 16-year-old co-worker in a back room and sexually assaulting her. The defendant admitted most of the acts on a series of calls recorded with *Glass* warrants, and told police that he did it because he was "just in one of his moods." This case is one in a recent upsurge of new sexual assault and sexual abuse cases, many from the rural communities.

The court imposed an extremely lenient sentence for Ernest Elizardo, who was convicted by his plea of second degree murder in the death of a 16-year-old acquaintance. Apparently influenced by the defendant's remorse, the judge sentenced Benson to only 10 years to serve, with 15 additional years suspended. The defendant was upset with the victim for telling him to quit playing with his gun while he was

drunk. Forensic evidence demonstrated the non-accidental nature of the shooting.

Jonathan Kukes plead out to sexual abuse of both of his daughters over many years. Although he has three prior felonies, two of them were not committed until after the charged acts of sexual abuse.

Approximately 15 people from the local domestic violence shelter program attended a recent DV sentencing as part of a court watch during National Crime Victims' Rights Week. Their presence likely contributed to a composite sentence of 30 months, with 15 months suspended, for two misdemeanor DV charges on Matthew Franks. The judge also revoked all 180 days suspended on two prior DV cases.

Arlo Olson was sentenced upon his plea to charges of coercion and two counts of assault III on the same victim, and criminal trespass, all domestic violence related. In spite of many letters of support for the defendant, including one from the victim, the court sentenced Olson, a first felony offender, to a composite sentence of 9 years, 275 days, with 5 years suspended, and probation for six years. He is still waiting for disposition of petitions to revoke probation in three prior misdemeanor DV cases.

KENAI

A woman was convicted of misdemeanor theft following a jury trial. A *pro se* defendant was convicted at a trial in Homer of assaulting his girlfriend's 16-year-old son. The victim was so frightened by the incident that he walked from his house directly to the police station to report it.

The grand jury indicted a 70-year-old man for sexually molesting four nieces and nephews. The children, from two families, were six, seven, and eight at the time that the sexual contact began. During the course of the investigation, troopers learned that the defendant's now 40-year-old daughter reported being sexually

molested from the time she was four until her mother divorced the defendant.

KETCHIKAN

A Ketchikan jury found Joshua Rowden not guilty of murder in the first and second degree and manslaughter for the death of a six-week-old baby. The baby had two subdural hematomas that were several weeks apart in age showing two separate incidents of abuse. Rowden admitted to shaking the baby so hard that the baby stopped breathing. The medical examiner from Seattle, where the autopsy was performed, said that bacteria got into the hematomas where the body's immune system could not get to, proliferated, and then escaped into the baby's brain killing him. The defense expert stated that while this baby was abused, the baby's death was caused by bacteria. The other injuries had nothing to do with the baby's death and were simply coincidences.

A man visiting Ketchikan was indicted for stealing \$2,500 from another person's bank account. He had flown to Anchorage after getting the money, but was arrested when he got off the plane. A Ketchikan man was indicted for criminal mischief in the third degree when he destroyed his ex-girlfriend's clothes by putting them in a bathtub and pouring bleach on them. Others were indicted for issuing bad checks, forgery, vehicle theft, burglary, misconduct involving controlled substance in the third and fourth degrees, and felony DUI.

KODIAK

A 40-year-old Kodiak man was sentenced to 7 years in prison with 4 years suspended, and fined \$10,000 with \$9,000 suspended upon his conviction on an attempted misconduct involving a controlled substance in the second degree. He sold three morphine pills to an undercover operative working with the Kodiak Police Department.

A 19-year-old Kodiak man was sentenced to 90 days in jail, and placed on probation for 5 years,

following his conviction for attempted interference with an official proceeding. This defendant had helped a friend chase down and catch another man whom his friend thought (correctly) had "narked him out", and then held the man while his friend beat him up. In addition to the jail time, this young man will have to perform 1,000 hours of community work service.

A 20-year-old Kodiak man was sentenced to 40 days in jail and ordered to complete 80 hours of community work service upon his conviction for forgery. He had taken his parents' checkbook and forged multiple checks totaling \$2,900. He was also placed on probation for 30 months and ordered to repay the money to his parents.

KOTZEBUE

After receiving an anonymous tip, the Kotzebue Police conducted a "knock and talk" at a local residence and found three ounces of cocaine, resulting in a charge of misconduct involving a controlled substance in the third degree.

A fatality involving the crash of two snowmachines has been submitted for a review of possible charges. Both drivers were probably intoxicated.

NOME

Several new sexual abuse of minors cases were part of the monthly intake, adding to an already significant caseload of similar offenses. After a man was arrested on drug charges in Koyuk, several young girls felt safe enough to report that he had molested them, and he admitted the molestations. A Unalakleet man was also arrested after the reported fondling of a young child. He, too, admitted the offense. A man visiting Shishmaref for the spring carnival reportedly had a sexual encounter with a 13-year-old. Before the offense was reported to the troopers, the girl's mother had called the man and chewed him out. He apparently felt so bad he called the troopers and confessed before the crime was even reported.

The interception of a package of marijuana in the mail blossomed into a variety of state and possible federal charges against three Nome men. The recipient of the package tried to lay off all responsibility on his roommate, who implicated both of them. A search of their residence resulted in \$1,000 of empty coin wrappers from Sacajawea dollars. This was interesting as \$2,000 of such coins had been stolen out of a mail shipment to the local bank in Nome. At that point the postal inspectors also became involved. A search warrant on another person's residence found the other half of the stolen money. All three men acknowledged that the money was stolen and that they knew it was stolen.

Jacob Anagick entered a no contest plea to the offense of second-degree murder stemming from the killing of Jimmy Jack with an ax in Nome last fall. Anagick's girlfriend, and co-defendant, remains scheduled for trial on the murder charge.

PALMER

William Horsey, 54, was sentenced to 119 years incarceration, without the possibility of parole, for the April 2002 robbery and murder of an elderly Palmer resident. Horsey had gone to the lady's home one evening to rob her to support his drug addiction. He confessed that he shot her three times when she became frightened and did not move fast enough when getting her purse from her bedroom closet. Horsey also admitted several other burglaries and thefts for sentencing purposes.

A man was indicted on one count of sexual assault in the first degree and one count of sexual abuse of a minor in the first degree for the lengthy abuse of a family member.

A jury convicted a man of DUI and reckless driving despite testimony by a defense witness that he was not the driver.

OSPA

(Office of Special Prosecutions & Appeals)

Petitions & Briefs of Interest

Prosecution News

Four Kotzebue area bootleggers indicted; Martin sentenced; Douglas's snowmachine seized. Four Kotzebue residents were indicted on charges of sale and manufacturing of alcohol. Anchorage defendant Martin James was sentenced to serve six months in jail and pay \$2,000 for shipping 36 bottles of alcohol without proper labeling to Bethel. Although alcohol is permitted in Bethel, the judge agreed with the state's assertion that the bottles were intended for bootlegging to the dry communities because the defendant had failed to label the packaging and had "burped" the bottles so that they would not make sloshing noises in transit. The snowmachine of a Shungnak resident was seized pending bootlegging charges, resulting in a respite from alcohol-fueled crimes in Shungnak for five weeks before the man obtained a new snowmachine.

Lielasus charged with welfare fraud. Anchorage defendant Melva Lielasus was charged with one count of first-degree theft and 34 counts of unsworn falsification after fraudulently receiving over \$40,000 in public assistance.

Piper Supercub forfeited. Jack Schmidt had a productive final month as the statewide Fish & Game prosecutor before transferring to the Juneau District Attorney's office. In a case against a big game guide accused of multiple violations, he negotiated the forfeiture of a Piper Supercub, over \$12,000 in fines, and over \$11,000 in restitution for the troopers' undercover operations.

Petitions of Interest

Felony DUI – prior out-of-state convictions. The state argues to the Alaska Court of Appeals that the defendant's two out-of-state DUI convictions qualify as prior convictions for purposes of Alaska's felony DUI statute even though the defendant was convicted in absentia. The court in each of the prior convictions had expressly warned the defendant that if he did not show up for trial, the trial would be conducted in his absence. *State v. Simpson*, A-8582.

Custodial interference statutes. The state argues to the Alaska Supreme Court that the court of appeals' recent interpretation of the custodial interference statutes (in *Perrin v. State*, 66 P.3d 21 (Alaska App. 2003)) to effectively require the state to disprove the defendant's subjective good faith for taking and withholding a child is (1) unsupported by the statutes' legislative history, and (2) inconsistent with the legislature's intent to eliminate the necessity defense for these crimes. The state also asserts that the court of appeals' interpretation will encourage more disgruntled parents to resort to self-help, in direct contravention to the legislature's intent in passing the statutes. *State v. Perrin*, S-11036.

Briefs of Interest

Extreme-indifference murder – proof of culpable mental state. The state argues that a defendant who had six previous DUI convictions, had four times refused to participate in alcohol treatment, and who was 10 years into a 28 year license revocation, acted with the extreme indifference necessary for second-degree murder when, after drinking beer all day, he drove home with a companion and misjudged a left turn. His companion was killed when oncoming traffic collided with the car. The

defendant had a blood-alcohol level of about 0.25 percent. *Jeffries v. State*, A-8167.

Court Decisions of Note - Alaska

Minimal competence – community standards. The state argues that the “community standards” test should be used to assess the claim that defense counsel was allegedly incompetent for failing to call an expert witness, that is, the court should look at whether a defense lawyer in Alaska would have called an expert witness. The state then argues that a competent defense lawyer in Alaska in 1994 would not have called an expert witness on false confessions because the admissibility of such testimony was questionable and a reasonable investigation would not likely have uncovered an available expert. *McMillian v. State*, A-8196.

Hearsay exception – statements against penal interest. The state argues that the court of appeals need not decide whether to adopt the federal rule that a “statement” for purposes of the statements-against-penal-interest exception includes only those declarations or remarks within a confession that are individually self-inculpatory. See *Williamson v. United States*, 512 U.S. 594, (1994). The state argues that the defendant did not preserve the issue on appeal and that each of the defendant's individual statements were self-inculpatory when viewed in the context of the entire statement. *Smith v. State*, A-8017.

Minimal competence – tactical decision. The state argues that a defense attorney was more than minimally competent by electing as a tactical matter, after consultation with nationally-known expert Barry Scheck, not to challenge the admissibility of the state's DNA evidence and instead to rely on cross-examination and the telephonic testimony of a defense expert to challenge the significance of the DNA evidence. In other words, an informed decision not to attack evidence, or to mount only a minimalist attack on evidence, can be a reasonable tactical decision. *Harvey v. State*, A-7963.

Statute and Rule Interpretations

Appellate Rule 214(d) and citation of unpublished decisions. In *McCoy v. State*, 59 P.3d 747 (Alaska App. 2002), the Alaska Court of Appeals held that Appellate Rule 214(d) – which states that unpublished memorandum decisions “are without precedential effect and may not be cited in the courts of the state” – does not preclude citing memorandum decisions for informational purposes in the trial courts. The Alaska Supreme Court recently denied the state's petition for hearing from *McCoy*, stating that the matter would be referred to the appellate rules committee. Practically speaking, this means unpublished decisions may be cited for informational purposes in the trial courts. *State v. McCoy*, S-10900.

AS 28.35.030 and predicate convictions from states without a state constitutional right to an independent test. The Alaska Court of Appeals held that for purposes of AS 28.35.030, the felony driving-while-intoxicated statute, prior driving-while-intoxicated convictions that were received in states without a state constitutional right to an independent test will count as predicate convictions for AS 28.35.030. The court of appeals reversed a lower court ruling to the contrary. *State v. Simpson*, Op. No. 1869 (Alaska App., April 25, 2003).

AS 44.03.010 and jurisdiction to prosecute crimes aboard state ferries. The Alaska Court of Appeals held that under AS 44.03.010, the jurisdiction of the state does not extend to crimes committed aboard a state ferry while the ferry is in Canadian waters. The legislature has now revised a separate statute (AS 12.05.020) to specifically allow the state to assert jurisdiction over crimes committed aboard state ferries. *State v. Jack*, Op. No. 1866 (Alaska App., April 11, 2003).